IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 474 OF 2004

Shri Yashwant Rama Nipurte ... Appellant

V/s

Shri Dattu Ragho Nipurte & anr. ... Respondents

Mr. A.R. Pitale for the appellant.

Miss Pretam Tendulkar for respondents 1 & 2.

CORAM: P.V. KAKADE, J.

DATED: 19TH SEPT., 2005

P.C.:

1. This appeal is preferred by the appellant against the judgment and order passed by the Addl. District Judge, Kalyan dated 30.12.2003 allowing the appeal and setting aside the judgment and order passed by the Civil Judge, J.D., Shahapur, dated 5.10.1999 in R.C.S. No. 6 of 1993 and dismissed the suit.

2. I have heard the learned counsel for both parties. Perused the record.

3. The appellant/plaintiff filed the suit for

declaration and possession of encroached portion of the property alleging encroachment by the defendants and for perpetual injunction as consequential relief, over the suit property.

4. It was the case of the plaintiff that he had become owner of the suit property by virtue of certificate under Sec.32-M of the B.T. & A.L. Act issued by the competent authority and the defendants had made encroachment over his property of Gat No.1 admeasuring 42 Ares, out of which 10 gunthas came to be encroached. Hence the suit was filed.

Defendants contested the suit inter-alia denying all the allegations and sought dismissal of the suit.

5. The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiff had proved his ownership and possession over the suit proeprty. It was further held that the plaintiff had proved that defendants had made encroachment to the extent of 2 gunthas and, as such, sthe suit came to be decreed for possession of the encroached portion as well as perpetual injunction.

The appeal was carried to the District Court at Kalyan. The learned Addl. District Judge, after hearing both parties, came to the conclusion that the plaintiff had failed to prove his ownership title to the suit property nor he proved the encroachment as alleged and hence he came to be non-suited by allowing the appeal. Hence the present appeal.

6. At the outset, it may be noted that there is absolutely no substantial question of law involved in this case. As the record shows, it is rightly pointed out by the learned lower appellate Court that the plaintiff had filed the suit on the basis of his ownership title to the suit property by virtue of 32-M certificate issued by the competent authority, however, pending the suit, the said certificate came to be revoked by the M.R.T. and the matter was in revision being Revision Appeal No. 20 of 1996 and the matter was remanded back to the Tahsildar, Shahapur for fresh enquiry which is still pending. Therefore, it is quite apparent that the issue of tenancy between the rival parties is still pending adjudication which was the position till the decision of the appellate Court in this appeal. Under the circumstances, neither the Trial Court nor the lower appellate Court could go into the

question of tenancy and, therefore, reference by the Civil Court to the Tenancy Court regarding the issue of tenancy does not arise as that issue is already subjudice before the competent authority i.e. revenue authority. The observations made in that regard by the lower appellate Court are also not proper and, as such, it must be held that the plaintiff has proved that he is owner of the property by virtue of Certificate under Sec.32-M of the B.T. & A.L. Act issued by the competent authority at the relevant time.

Once this position is clear, the remaining issues are regarding the factual aspects pertaining to the alleged encroachment to the extent of 2 gunthas by the respondents, however, as the lower appellate Court observed that there is no evidence at all to show that there was any encroachment over the land of Gat No.1 consisting of 42 gunthas and, as such, there was no question of decreeing the suit for possession and perpetual injunction and, therefore, appeal came to be allowed.

7. In my view, there is absolutely no perversity in the reasoning adopted by the lower appellate Court and, as such, I hold that there is no merit in the appeal and

hence the appeal stands dismissed with no order as to costs. Consequently, Civil Application No. 1355 of 2005 also stands dismissed with no order as to costs.

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